Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

80-165

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MAISLIN TRANSPORT OF DELAWARE and
MAISLIN TRANSPORT LTD.,

Petitioners,

—against—

FARRELL LINES, INCORPORATED, As Successor by
Merger to American Export Lines,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSEPH S. ROSENTHAL
Counsel for Petitioner
1140 Avenue of the Americas
New York, New York 10036
(212) 575-9100

Questions Presented for Review

1. Where an ocean carrier of goods under a through bill of lading, including an inland voyage, contracted with an inland carrier for the latter to carry the goods on the inland voyage, on an inland bill of lading prepared by the ocean carrier; the inland bill of lading stated that where the freight rate is dependent on value, the shipper is required to state in writing the agreed or declared value of the shipment; the inland carrier's filed tariff stated that where no value for the goods is shown on the bill of lading, it is understood that the shipment has a released value of $500.00; the spaces on the inland bill of lading for both freight rate and valuation of the goods were left blank; the freight rate paid by the ocean carrier to the inland carrier was based on the released value of $500.00, although the actual value was greater; and the ocean carrier and the inland carrier had had a course of conduct under which the ocean carrier had prepared the inland bills of lading, the spaces for freight rate and valuation had been left blank and the ocean carrier had paid the minimum, or released value, freight rate, did the Carmack Amendment (49 U.S.C., Sec. 20(11), in effect at the applicable times permit the inland carrier to avail itself of the limitation of liability of $500.00, for damage to the goods en route?

2. Assuming the same facts as are contained in the previous question, do the provisions of 49 U.S.C., Section 10730, presently in effect, permit the inland carrier to avail himself of the said limitation of liability, for damage to the goods en route?

Parties to the Proceeding

The title of this action in the United States District Court for the Southern District of New York, where this action was commenced, was as follows:

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4175 (LFM)

GORDON H. MOONEY, LIMITED,

Plaintiff,

--against—

TERFLOTH & KENNEDY B.V., AMERICAN EXPORT LINES, INC., SEABRIDGE INTERNATIONAL SHIPPING LIMITED, MAISLIN TRANSPORT OF DELAWARE and MAISLIN TRANSPORT LIMITED,

Defendants.

The title of this action in the United States Court of Appeals for the Second Circuit was as follows:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GORDON H. MOONEY, Limited,

Plaintiff-Appellee,

—against—

TERFLOTH & KENNEDY B.V., AMERICAN EXPORT LINES, INC., SEABRIDGE INTERNATIONAL SHIPPING LTD., MAISLIN TRANSPORT OF DELAWARE and MAISLIN TRANSPORT LTD.,

Defendants,

and

FARRELL LINES, INCORPORATED,
As Successor by Merger to American Export Lines,

Defendant-Appellant,

and

MAISLIN TRANSPORT OF DELAWARE and
MAISLIN TRANSPORT LTD.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN THE

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Petitioners,

—against—

FARRELL LINES, INCORPORATED, As Successor by
Merger to American Export Lines,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Reports Below

The opinion in this action of the United States Court of Appeals for the Second Circuit, dated February 22, 1980, entitled "Gordon H. Mooney, Ltd. v. Farrell Lines, Inc." is set forth at 616 F.2d 619.

The opinion of the United States District Court for the Southern District of New York is unreported.

Jurisdictional Statement

The judgment sought to be reviewed is dated February 22, 1980 and was entered on February 22, 1980.

By order dated March 18, 1980, the United States Court of Appeals for the Second Circuit granted petitioner an extension of time within which to file a petition for re-

hearing to and including April 10, 1980. Petitioner filed its petition for rehearing prior to that day.

By order dated May 13, 1980, the United States Court of Appeals for the Second Circuit denied the said petition for rehearing.

This Court has jurisdiction to review the judgment in question by Writ of Certiorari pursuant to the provisions of 28 U.S.C., Section 1254.

Statutes Involved

This case involves the interpretation and construction of the Carmack Amendment, 49 U.S.C., Section 20(11), 24 Stat. 386, as amended from time to time, which was in effect at the times in question herein. The Carmack Amendment was repealed by Public Law 95-473, Sections (b) and (c), October 17, 1978, 92 Stat. 1389, the effect of which was to enact 49 U.S.C., Section 10730 in its place.

Because of the length of the provisions of those statutes, the pertinent text thereof will be set forth in the appendix hereto. For the Court's convenience, we have underlined the pertinent provisions of the Carmack Amendment.

Statement of the Case

Jurisdiction was vested in the United States District Court for the Southern District of New York under and pursuant to 28 U.S.C., Section 1332, because of diversity of citizenship of the parties and the amount in controversy.

The case arose out of damage to a shipment of frozen Dover sole. Plaintiff below, Gordon H. Mooney, Ltd. ("Mooney"), an Ontario corporation, had contracted with defendant below, Terfloth and Kennedy B.V., a Dutch company, to purchase 36,000 pounds of Dover sole for

$96,600.00 Canadian (A 482).* The goods were to be shipped in 1400 cartons (A 482). Mooney thereupon contracted with American Export Lines, Inc., later merged into Farrell Lines, Incorporated, respondent herein, to carry the cargo from Amsterdam to Toronto, pursuant to the terms of respondent's ocean bill of lading, which included transshipment (A 553). The 1400 cartons of frozen fish were placed in a sealed forty-foot reefer container in good order and condition (A 553). Mooney paid for the Dover sole and received all documents of title on or about September 28, 1976 (A 553).

After a presumably uneventful ocean voyage, respondent's ship, in which the reefer, packed with the 1400 cartons of frozen fish, was stored, arrived in the Port of New York in September of 1976 (A 501). Respondent arranged with Maislin Transport of Delaware and Maislin Transport Ltd. (hereinafter collectively "petitioner"), an inland motor common carrier, for petitioner to transship the reefer, containing the 1400 cartons of frozen Dover sole, to respondent's agent, Seabridge International Shipping Ltd. (hereinafter "Seabridge"), at a certain address in Mississagua, Ontario, Canada. The shipment is evidenced by an inland bill of lading prepared by respondent (48a).**

This bill of lading, prepared by respondent on its own form, states as follows:

> "Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by

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* Figures in parentheses preceded by "A" refers to pages in the joint appendix in the Court of Appeals for the Second Circuit.

** Figures in parentheses followed by "a" refer to pages in the appendix to this petition.

the shipper to be not exceeding
per ."

The blank spaces in the quoted portion of the bill of lading set forth above were not filled in.

Petitioner was, at all times, subject to the jurisdiction of the Interstate Commerce Act and the Rules and Regulations of the Interstate Commerce Commission (A 554). It had filed its tariff under the Niagara Frontier Tariff, Tariff 787-B, which provided as follows (11a):

> "RELEASED VALUATION. Charges named in this tariff apply only when shipment is released to a value not exceeding $500.00 per container and contents. When no value is shown on the Shipping Order or Bill of Lading, it will be understood that the shipper agrees to and declares that the value of the shipment is released to an amount not exceeding $500.00 per container and contents."

The freight rate paid by respondent to petitioner was based upon the released value of $500.00, the cheapest rate it could pay, although the actual value of the shipment was far greater. That payment of the cheapest possible freight rate reflected a continuing course of conduct between the petitioner and the respondent (A 638, A 639). The respondent had hired the petitioner to transship containerized cargoes, on their inland voyages, on many occasions, both before and after the instant shipment. In all cases, respondent had prepared the bills of lading, the spaces for freight rate and valuation had been left blank and the ocean carrier, respondent herein, had paid the minimum freight rate, based on released value.

The petitioner transshipped the instant container, containing the 1400 cartons of frozen fish, to Seabridge in

Canada. Unfortunately, the fish decomposed en route. The appropriate public authorities in Ontario declared the fish to be unfit for human consumption (A 632).

This lawsuit followed. Although many parties were named as defendants, the case developed into a three-cornered dispute between Mooney, as plaintiff, and petitioner and respondent, as defendants, who cross-claimed against each other. Petitioner interposed a defense of limitation of liability (A 31).

The case was referred to Magistrate Jacobs of the United States District Court for the Southern District of New York. Magistrate Jacobs, after a full hearing on the merits, held that Mooney was entitled to a full recovery, that respondent was liable in full for its negligence, that petitioner was not negligent and that respondent was not entitled to indemnity against petitioner, nor was it entitled to any apportionment of damages against petitioner (13a-15a).

That decision rendered petitioner's partial affirmative defense of limitation of liability moot. Nevertheless, Magistrate Jacobs discussed that defense at some length (11a-13a). As we read that discussion, Magistrate Jacobs would have upheld the limitation if it had not been moot.

Magistrate Jacobs concluded that Mooney was entitled to recover against respondent for the amount of the damage which it had sustained, in the amount of $92,100.00 in Canadian currency which, at that time, was the equivalent of $94,760.00 in American currency and recommended that plaintiff have judgment in that amount against respondent, with interest from the date of the loss (14a-15a).

District Judge MacMahon confirmed the Magistrate's findings and adopted his conclusions (18a-19a). A judgment was entered accordingly.

Respondent thereupon appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals, in reversing the judgment of the District Court, held that both respondent and petitioner were guilty of negligence in the handling of the shipment, in an equal degree (36a-37a). The Court of Appeals went on to hold, so far as petitioner's claim of limitation of liability was concerned, that since neither the freight rate nor the valuation of the shipment was written on the instant bill of lading, petitioner had not complied with the language of the Carmack Amendment and that, accordingly, it was not entitled to a limitation of liability (35a).

In this petition for a writ of certiorari, we do not seek review of that portion of the decision of the Court of Appeals which reversed the lower court and held petitioner negligent, jointly with respondent. Although we strongly disagree with that conclusion, we do not believe that the importance of that holding is such as to justify granting of a writ of certiorari.

In this petition, we seek a writ of certiorari, so as to review only so much of the decision of the Court of Appeals as denied petitioner's defense of limitation of liability, for the reasons immediately following.

ARGUMENT

The Writ of Certiorari Should Be Granted

POINT I

The Court of Appeals Committed Error in Disallowing Petitioner's Claim of Limitation of Liability.

The Court of Appeals held that because neither the freight rate nor the valuation of the shipment was written on the bill of lading in question, petitioner may not limit its liability under the Carmack Amendment. That holding represents a clearly erroneous interpretation of that statute.

Under the Carmack Amendment, all that is necessary to bring the limitation into play is a "value declared in writing by the shipper or agreed upon in writing as to the released value of the property" (45a). The bill of lading in the instant case, a contract between two parties, both of whom are in the business of transporting goods for hire, was prepared on respondent's form and signed by its agent. It states that where the rate is dependent on value, which it admittedly was, "shippers are required to state specifically the agreed or declared value of the property" (48a). The space in the printed form, in which the agreed or declared value of the property was supposed to have been filled in, was left blank by respondent.

That constitutes compliance with the statute. Since the freight rate was admittedly dependent on value and since the freight rate was, in fact, the released value rate, respondent's failure to insert any other value in its own bill of lading constitutes an express agreement by respondent to be bound by the released value.

Ever since the opinion of this Court in *American Railway Express Co.* v. *Lindenburg,* 260 U.S. 585, 43 Sup. Ct.

206 (1922), the rule has been that where a shipper accepts a bill of lading or other shipping documents, he is bound by its terms. In the *Lindenburg* case, the carrier delivered its express receipt to the shipper, limiting its liability for loss or damage to the shipper to the sum of $50.00 unless the true value was declared. The true value was neither stated by the shipper nor demanded by the carrier and the freight rate was based on the released value.

The Supreme Court of Appeals of West Virginia, which had held for the shipper, stated that since the receipt was not signed by the shipper, he could not be bound by its terms, purporting to limit liability.

This Court, in reversing the West Virginia Supreme Court of Appeals, stated (260 U.S. at 591, 592, 43 Sup. Ct. at 209):

> "The respondent, by receiving and acting upon the re-receipt, although signed only by the petitioner, assented to its terms and the same thereby became the written agreement of the parties. In the absence of a statutory requirement, signing by the respondent was not essential. His signature, to be sure, would have brought into existence additional evidence of the agreement but it was not necessary to give it effect. Having accepted the benefit of the lower rate dependent on specific valuation, the respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing."

The applicable statute in the *Lindenburg* case was then known as the Cummins Amendment. The controlling language, however, was identical with the applicable language of the Carmack Amendment.

If anything, this is a stronger case for the imposition of the limitation of liability than *Lindenburg, supra*. In *Lin-*

denburg, a receipt prepared by the carrier was given to the shipper, who presumably was not in the business of carrying goods for hire. It was not signed by the shipper.

In the instant case, respondent was not truly a shipper at all. Respondent prepared the bill of lading on its own form, signed it, left the applicable spaces blank, accepted petitioner's lowest freight rate based upon released value and now seeks to avoid the limitation of liability.

In addition to being in conflict with the controlling authority of the *Lindenburg* case, the instant case is in conflict with an indistinguishable case from another circuit. In *Boeing Co.* v. *U.S.A.C. Transport, Inc.,* 539 F.2d 1228 (9th Cir. 1976), the shipper sustained actual damages of over $400,000.00 when two of its jet engines were damaged in transit on one of the carrier's trucks. The lower court had granted the carrier's motion for summary judgment in the reduced amount of approximately $62,000.00 on the theory that that was the released value agreed upon between the parties.

In the *Boeing* case, the particular shipment was one of a series made pursuant to an agreement between the shipper and Pratt & Whitney, in which Pratt & Whitney agreed to supply the engines in question to the shipper. The shipper conducted discussions with the carrier pertaining to freight rates, and at the shipper's request the carrier had filed and duly published tariffs with established rates for shipment of those engines between Pratt & Whitney's plant in Connecticut and the shipper's plant in the State of Washington, at a particular released value. Additionally, the shipper provided Pratt & Whitney with standard shipping instructions requiring Pratt & Whitney to ship the engines via the carrier at released value rates. In fact, it was at the shipper's insistence that the released value rate, rather than the actual value, was used.

In the shipment in question, the carrier's driver signed for the cargo at Pratt & Whitney's plant in Connecticut on a shipping document provided by Pratt & Whitney which, as usual, bore no statement of released value. When the shipment arrived at the carrier's terminal in the State of Washington, the carrier issued its own straight bill of lading which contained an appropriate written statement of released value and which accompanied the shipment to the point of the accident and then to its ultimate delivery to the shipper. At that point, the shipper's agent signed the bill of lading, acknowledging delivery, noting the damaged cargo but raising no objection to the statement of released value contained in the bill of lading. An invoice was later prepared by the carrier, billing the freight at the released value, which was paid by the shipper.

In affirming the District Court's grant of summary judgment to the carrier, the Court of Appeals stated that the record demonstrated that the parties "were engaged in an agreed-upon practice by which U.S.A.C. would transport engines for Boeing solely at the released value rate; that the carrier would issue its bill of lading embodying the contract of carriage some time after it had accepted the relevant shipment; and that the provisions of the bill issued here, along with the rate ultimately charged and paid, were lawful under the applicable statute and tariff" (539 F.2d at 1230).

The Court of Appeals went on to discuss the effect of the Carmack Amendment and of the *Lindenburg* case, *supra,* as follows (539 F.2d at 1231):

> "Nor can we accept Boeing's contention that the carrier's Bill of Lading contained no statement of released value 'agreed upon in writing' as required by Section 20(11). Under the circumstances of this case, the evi-

dence of Boeing's knowledge of, and assent to, the written statement of released value—including that of Boeing's instructions to Pratt & Whitney, its past conduct, its subsequent acceptance of the bill without objecting to that statement of value, and its payment of freight at the 'released value' rate—amply supports the District Court's conclusion that the statutory requirement is satisfied. Of course the signature of Boeing's agent would have constituted the most satisfactory evidence of its agreement to the statement of released value, but such evidence is not required. *American Railway Express Company* v. *Lindenburg,* 206 U.S. 584, 590-592, 43 S. Ct. 206, 67 L.Ed. 414 (1923). Moreover, we fully agree with the District Court's conclusion that 'it would be inequitable for Boeing to now be allowed to recover for the damage to the shipment in question on a full value basis'. As the Court observed in *Lindenburg, supra,* 206 U.S. at 592, 43 S. Ct. at 209:

'Having accepted the benefit of the lower rate dependent upon the specified valuation, the respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing'."

In the instant case, the Court of Appeals held that "because neither the freight rate nor the valuation itself was written on the bill of lading, Maislin may not limit its liability under the statute" (35a). This is plain error. Nothing in the Carmack Amendment requires the freight rate to be set forth in the bill of lading.

So far as valuation is concerned, the *Lindenburg* and *Boeing* cases demonstrate that a statement of the value of the shipment was not necessary in order to bring the limita-

tion of liability into play, where the bill of lading, prepared by respondent, required respondent to state the value in writing, if it wished the value to be other than the released value and where the freight rate which it paid petitioner was admittedly based on released value.

Additionally, the Court of Appeals gave no weight whatever to the conceded course of dealings between the parties. Thus, the underlying rationale of both the *Lindenburg* and the *Boeing* cases, that fair dealing between the parties is the ultimate criterion, was completely ignored by the Court of Appeals. In sum, the Court of Appeals committed plain error in this case by failing to uphold the limitation of liability in the petitioner's favor.

POINT II

The Court of Appeals Has Decided an Important Question of Federal Law in a Way in Conflict With the *Lindenburg* Case and in Conflict With the *Boeing* Case.

Rule 17 of the Rules of this Court, adopted April 14, 1980, and effective June 30, 1980, is entitled "Considerations Governing Review on Certiorari." It is stated in that Rule that review on a writ of certiorari is a matter of judicial discretion and will be granted only when there are special and important reasons therefor. Among the criteria listed in that Rule for the exercise of the Court's discretion are the rendering of a decision by a Federal Court of Appeals in conflict with the decision of another Federal Court of Appeals on the same matter and a decision by a Federal Court of Appeals on a federal question "in a way in conflict with applicable decisions of this Court."

Both these criteria are present in the instant case. The decision by the Court of Appeals for the Second Circuit in

this case is in plain conflict with the *Lindenburg* decision, *supra,* of this Court and the *Boeing* decision, *supra,* of the Court of Appeals for the Ninth Circuit.

Moreover, this case did not decide some abstruse point of law which will have no practical application except as between the instant parties. The Carmack Amendment is one of the single most important statutes regulating the interstate transportation of goods. Although, as the Court of Appeals pointed out, it has recently been amended (49 U.S.C., Section 10730, Public Law 95-473, October 17, 1978), no substantive change was intended.

Section 10730 states that a carrier's liability may be "limited to a *value established by a written declaration of the shipper, or by a written agreement,* when that value would be reasonable under the circumstances surrounding the transportation." (Emphasis supplied.)

The corresponding language in the Carmack Amendment spoke of "rates dependent upon *the value declared in writing by the shipper or agreed upon in writing* as the released value of the property." (Emphasis supplied.)

In view of the similarity of language, it may safely be assumed that when Congress recodified Title 49 of the United States Code, it intended that the law governing limitations of liability would remain the same.

See, for example, *Anderson* v. *Pacific Coast Steamship Co.,* 225 U.S. 187, 198-199, 32 Sup. Ct. 626, 630 (1911).

It is a matter of common knowledge that the type of shipment which occurred in this case, a containerized ocean voyage followed by transshipment of the same container on an inland voyage, is becoming increasingly more prevalent. It is respectfully submitted that the instant decision of the Court of Appeals will cause a great deal of mischief

in this field. Courses of conduct between carriers and shippers and between carriers and other carriers, sanctioned by many years of usage under the *Lindenburg* doctrine, have been called into question. Other Courts, both state and federal, which have not as yet decided this issue, will be faced with a dilemma when they are called upon to decide that issue, in view of the present conflict in decisions.

We respectfully request this Court to grant the Writ of Certiorari, so as to resolve this issue.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Granted.

Respectfully submitted,

JOSEPH S. ROSENTHAL
Counsel for Petitioner
1140 Avenue of the Americas
New York, New York 10036
(212) 575-9100

HARVEY P. ROSENBERG
EDWARD CHERNEY
Of Counsel

APPENDIX

Report of Magistrate Martin D. Jacobs, of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4175 (LFM)

GORDON H. MOONEY, LIMITED,

Plaintiff,

—against—

TERFLOTH & KENNEDY B.V., AMERICAN EXPORT LINES, INC., SEABRIDGE INTERNATIONAL SHIPPING LIMITED, MAISLIN TRANSPORT OF DELAWARE and MAISLIN TRANSPORT LIMITED,

Defendants.

I.

Preliminary Statement

Plaintiff, which imported Dover sole from Rotterdam to Toronto, seeks damages against American Export Lines, Inc. (AEL) and Maislin Transport of Delaware (Maislin) because the fish (shipped in a container overseas to New York and by truck to Toronto) arrived in Toronto decomposed and unmarketable. AEL was the ocean carrier to New York and Maislin the inland truck carrier to Toronto. The essence of the claim against AEL and Maislin is that the shipment should have been refrigerated at 5° below zero but after arrival in New York the temperature was changed and the shipment decomposed at Toronto.

Report of Magistrate Martin D. Jacobs, of the United States District Court for the Southern District of New York

After hearing certain testimony Judge MacMahon by order dated May 9, 1978 referred the action to me for trial and findings of fact pursuant to stipulation among the parties. The trial was held before me on October 25, 26, and 27, 1978. Many post-trial briefs were filed and oral argument was held on March 12, 1979.

Briefly stated the contentions of the parties are as follows: Plaintiff claims that AEL and Maislin are each responsible for the damage sustained without any limitation of liability in their favor. AEL claims that 1) the damage occurred after the container was turned over to Maislin and Maislin alone is liable, and 2) while AEL does not rely on any limitation of liability as against plaintiff, it seeks indemnity from Maislin for any liability without any limitation in Maislin's favor. Maislin claims that 1) it is not liable since in raising the temperature it acted reasonably and in reliance upon the negligent instructions of AEL, a sophisticated carrier, and 2) in any event it is entitled to the benefit of a tariff limitation of $500.

II.

Evidence At Trial

A.

Shipment to Canada. Decomposition of Fish.

At the trial plaintiff called as witnesses Mr. Mooney, plaintiff's president and sole stockholder (4 et. seq.); Mr. Lees, supervisor of Department of Fishing (57); Mr. Darlington, employee of Seabridge (agent of AEL) whose duty was to document imports (106); Mr. Hallek, maintenance manager for AEL (193); Mr. Terrell, truck driver of

Report of Magistrate Martin D. Jacobs, of the United States District Court for the Southern District of New York

Maislin (238); and Mr. Pace, director of claims for Maislin (265). AEL called Mr. Henkels, transportation consultant (144) and Mr. Crawford, surveyor (362). Maislin called Ms. Crapser, biller for Maislin (330), and Mr. Gallo, long haul dispatcher of Maislin (339).

Plaintiff is in the business of merchandising frozen fish. On July 15, 1976 it contracted for the purchase of 36,000 pounds of Dover sole (Pltff. Ex. 1). It received from the seller an invoice dated August 25, 1976 (Pltff. Ex. 2). It received from AEL a bill of lading (Pltff. Ex. 3) which describes the goods as follows: "40 ft. reefercontainer s.t.c. 700 cartons iqf Doversoles, size 12/16 700 cartons iqf Doversoles, size 16/20 Marks: N/M HOUSE/HOUSE SHIPPERS LOAD STORAGE AND COUNT FREIGHT PREPAID Temperature minus 5 degrees Fahrenheit below zero. Packers seal no: 0716 Shipped on board August 24th 1976."

As appears from Pltff. Ex. 4, AEL on three occasions transferred the 1,400 boxes of frozen Dover soles into different containers and thus had knowledge that it was packing 1,400 containers of frozen fish. AEL is not urging that the container and its contents constituted a single package subject to the loss or damage liability limitation of $500 per package.

Paragraph 16 of the bill of lading provides for the $500 limitation and limits the carrier's liability "unless the nature of the goods and a valuation higher than $500 per package or shipping unit shall have been declared in writing by the shipper".

A significant clause of the bill of lading, upon which AEL relies, is Paragraph 10 which states in pertinent part: ". . . the liability of (American Export Lines) shall absolutely cease when the goods are out of its exclusive pos-

session and shall not resume until the goods again come into its exclusive possession; and the responsibility of this Carrier during any such period shall be that of an agent of the Shipper and/or Consignee, and (American Export Lines) shall be without responsibility whatsoever".

The shipment arrived in New York on September 10. Plaintiff was notified on that day of its arrival. In order to obtain the shipment it was necessary for plaintiff to arrange with its bank to finance the purchase (16, 29). Plaintiff negotiated with its bank in Canada from September 10 to September 27 and made arrangements for the release of the bill of lading. In the meanwhile the container was at the Maislin yard at Toronto (117). There is no question that the shipment was properly refrigerated below zero while on the vessel but that after it was turned over to Maislin for delivery to Toronto the temperature was increased.

When the shipment was finally opened at the Maislin yard in Toronto it was found to be decomposed. As testified to in detail by the Canadian authorities, there were three examinations, thirty samples were examined, and the shipment was rejected as "refused entry due to decomposition" (Pltff. Ex. 6, 72). Plaintiff's insurer denied coverage (47), $4,500 was realized for the shipment in its actual condition leaving a balance claimed by plaintiff in Canadian currency of $92,100. I find that the shipment was not marketable when opened in Toronto.

B.

Basic Documents

At this point it will be helpful to discuss the basic shipping and other documents, which are a backdrop of the dis-

pute, including their contents, the purpose for which prepared, the circumstances under which prepared and the expert testimony as to whether the documents and conduct of the parties was in accordance with usual business practice.

Inland Bill of Lading (Maislin Ex. E):

As appears on its face this "inland bill", prepared by AEL, is silent as to any temperature requirement.

Crawford was asked: "Q. Would you say on a reefer container that some type of temperature or some instructions as to freezing or condition should have been on that bill of lading. A. Yes. Q. Would you say that this was bad practice for AEL to do that. A. It's certainly an error." (402).

Henkels was asked: "Q. Isn't it a fact that ordinarily all shipping instructions are contained on the shipping order, which is the only, — represents the undertaking that the shipper imparts to the carrier and that the carrier agrees to accept. A. Yes." (172).

This document was turned over to Terrell, Maislin's truck driver. Terrell testified that he received Maislin's Ex. E, and Pltff. Ex. 8 (245).

Interchange Order Prepared by AEL and Delivered to Trucker (Pltff. Ex. 8):

As testified to before Judge MacMahon, Hallek said that this document was "an equipment interchange receipt". It states "required temperature 50°, temperature set at 50°, temperature reads 50° ". He testified that the temperature recorded on this receipt "is the temperature that our inter-

change people felt or believed the temperature required on that container". As appears from the face of this document, Terrell acknowledged the receipt of this document and testified that the "reefer mechanic did get up on the container and he read the temperatures that are contained in the TIR" (420). *Crawford* acknowledged that the temperature notation on Pltff. Ex. 8, as well as that on Pltff. Ex. 11, was an error explaining that "there were a number of containers of photographic material at the terminal at that time which had a 50° temperature requirement and the driver had written the number 50° down and he just wrote 50° on this slip in error" (421).

Reefer Receipt (Pltff. Ex. 11):

This repeats the information in the TIR (Pltff. Ex. 8) as to the required temperature of 50°.

Pro or way Bill Prepared by Maislin (AEL Ex. A):

This document has a notation "maintain 40 deg. temp." which was explained by the testimony of Crapser and Gallo.

When the container arrived at its terminal in Carney, Crapser, who had the responsibility of preparing the pro or way bill, decided that the container needed some protective service and asked Gallo, line dispatcher, about some sort of protective service (333). Gallo testified that he checked the TIR (Pltff. Ex. 8) and the maintenance supervisor Fahrenfeld told him that the reefer was running at 40° and Gallo passed this information on to Crapser (344). A notation "40° " appears on an inspection report (Pltff. Ex. 15).

There was much discussion at the trial as to whether the various witnesses understood that Dover sole was fresh

fish. Maislin relies on the testimony of Terrell, Crapser, and Gallo that they did not know what Dover sole was. It contends that this is not generally known. Maislin urges that there was no indication on any of the documents that the cargo was perishable; and indeed, if known to be fish, it could have been dried fish which would not be frozen (355).

C.

Testimony of Other Witnesses Including Three Experts Called or Employed by AEL

Testimony of Darlington:

He testified that on September 27 a woman employee of Maislin told him that the fish had gone rotten and he sought to contact Chidiac, the operation manager of Maislin in New York. Unable to reach him he talked to Giordano, the assistant terminal manager, who said that "the girl in that office had made up the bill wrong" (123). A memorandum prepared by Darlington (Pltff. Ex. 7) quotes Giordano as saying that "the container was set at wrong temperature and it was Maislin's mistake". In my view this statement or memorandum has little significance. There is no question that the inland bill of lading was "made up wrong" but the ultimate question is who is responsible for "making it up wrong" and whether the error is attributable to AEL.

Testimony of Pace:

His testimony dealt primarily with the records maintained by Maislin relating to the circumstances under which the temperature was increased. He acknowledged that there was a gap in the records from September 10 to Sep-

tember 20 (281). His investigation disclosed that the way bill was prepared after inquiries made by Gallo, the dispatcher (275). His view is that when the container reached Toronto it was shut off to reach 40°. AEL's counsel and its expert Crawford were given access to all documents (357). In his view the documents prepared by and received from AEL justified Maislin in maintaining the temperature at 50° or less.

Testimony of Terrell:

As already noted, he received from AEL employees Maislin's Ex. E (inland bill) and TIR (Pltff. Ex. 8). He did not discuss the requested temperature when the documents were received (250). He received Pltff. Ex. 11 which noted a required temperature of 50° from the reefer mechanic.

Testimony of Hallak:

He testified that the TIR (Pltff. Ex. 8) was prepared by AEL and given to the driver of the equipment (224). When questioned as to the various documents and the requested temperature of 50° he significantly testified "I feel there was an error made by both parties" (226). Asked by the Magistrate "why shouldn't the receiving carrier be entitled to accept that (the notations on the documents) at its face value?", he answered "I have no opinion" (228).

Testimony of Henkels:

He recognized that the TIR (Pltff. Ex. 8) was usually prepared by the party giving up control and acknowledged the receipt of the equipment (168). Admits that the TIR was prepared on behalf of AEL (170). He said that people

in the trucking business were expected to know what Dover sole is (153). He testified that the temperature was changed on September 9 or September 10 (393). Mr. Henkels expressed the opinion that the later carrier should hold the temperature without regard to the documents received from the initial carrier (385). He stated that as far as temperature and instructions are concerned "I place no reliance whatsoever on a TIR" (386). Insisted that it was not good practice to change the temperature (410).

III.

Discussion, Findings, and Conclusions

A.

Plaintiff's Claim Against AEL

AEL's position, relying upon Paragraph 10 of the bill of lading (II A, *supra*), is that it is relieved of any liability since the damage occurred to the shipment when it no longer had exclusive possession of the cargo. However, it overlooks the important provision in Paragraph 10 that even when the goods are out of the exclusive possession of AEL "the *responsibility* of this carrier during any such period *shall be that of an agent of the shipper*" (emphasis supplied). Under the facts here present AEL, acting as agent, breached its obligation as agent to take reasonable action to protect the cargo. Its conduct in giving inaccurate instructions to Maislin as to the temperature was a breach of such obligation. We have already reviewed (II B, *supra*) the many documents and circumstances which show that they not only failed to include instructions in

the inland bill of lading prepared by it (Maislin's Ex. E) but negligently gave inaccurate and misleading instructions in the TIR and other documents (Pltff. Ex. 8). AEL's experts admitted that this was a mistake and bad practice. There can be no escape from the conclusion that AEL is liable for creating the unfortunate situation that developed by giving such inaccurate and negligent instructions.

AEL, acting as agent, was under a duty to act reasonably to protect the cargo. It is a basic and elementary principle that if an agent fails to perform its obligations it is responsible for the damage caused. As was stated by the Supreme Court, as early as 1879, in *Case* v. *Citizen's Bank of Louisiana,* 100 U.S. 446:

> "Whenever an agent violates his duties or obligations to his principal, and loss ensues to the principal, he is responsible therefor, Judge Story, and is bound to make a full indemnity. Story, Ag., 6th ed., sec. 217 a."

AEL's reliance upon the "last carrier doctrine" is unavailing. This doctrine, usually applied to a claim by a shipper, recognizes that the last carrier is not responsible if it can prove that "it was not negligent or that it comes within one of the COGSA 'excepted causes' " § 1304(2). One of such causes is an act of the shipper. See *Madow Co.* v. *SS Liberty Exporter,* 569 F.2d 1183, 1185 (2d Cir. 1978). Here plaintiff in giving instructions to Maislin was acting as agent for the shipper, as set forth in the plain language of Paragraph 10 of the bill of lading.

Report of Magistrate Martin D. Jacobs, of the United States District Court for the Southern District of New York

B.

Plaintiff's Claim Against Maislin

1) The primary and serious negligent conduct of AEL, acting as agent for plaintiff, is chargeable to and binding upon the plaintiff shipper. While AEL contends that Maislin should not have relied upon the temperature instructions from AEL, I believe this position is unreasonable and untenable. Plaintiff must seek redress from AEL alone. The fact that Maislin's records were not entirely complete as to the precise time when the temperature was increased can not divert attention from the basic facts here present. Maislin acted responsibly and with diligence when the employee prepared the pro or way bill (AEL Ex. A) after undertaking to ascertain what protection should be afforded to the container. While conceivably it might have made inquiries beyond what it actually did, I am not prepared to find that it acted negligently or wrongfully.

2) Maislin contends that in any event its liability must be limited to $500. This presents a troublesome question. It relies on the following tariff provision under the Niagara Frontier Tariff, Tariff 787-B, in particular 210, which provides: "RELEASED VALUATION. Charges named in this tariff apply only when shipment is released to a value not exceeding $500.00 per container and contents. When no value is shown on the Shipping Order or Bill of Lading, it will be understood that the shipper agrees to and declares that the value of the shipment is released to an amount not exceeding $500.00 per container and contents."

AEL and plaintiff contend that this tariff limitation is not applicable and must yield to the statutory provision in the Carmack Act (49 USC § 20(b)(11)) which states

that any limitation of liability shall not be valid unless "declared in writing by the shipper or agreed upon in writing as the release value of the property". In support of this contention reliance is placed on the decision of the Court in *Caten* v. *Salt City Movers & Storage Co., Inc.*, 149 F.2d 428 (2d Cir. 1945) where in an action by the shipper against a rail carrier it was held that "any attempt to limit liability is prohibited except upon a declaration of value by the shipper in writing or a release value agreed to in writing". Of interest also are the decisions of the New York Court in *Kaufman* v. *Pennsylvania Railroad,* 64 NYS 2d 690 (1st Dept. 1945) and *Loeb* v. *Friedman's Express, Inc.,* 187 Misc. 89, aff'd without opinion, 296 NY 1029, cert. denied, 331 US 851 (1947).

In *Kaufman* the action was to recover damages for the actual value of a suitcase. The bill of lading provided "subject to the classification and tariff in effect". There was a statement in writing on the bill of the amount of the charge pre-paid by the shipper. Judgment was allowed for the value of the shipment. In *Loeb,* an action against a truck carrier, the charges were not entered in writing on the bill of lading nor were they pre-paid by the shipper. The Court distinguished *Kaufman* where the limitation was upheld on the ground that there the shipper "was estopped from asserting a higher value". The Court held that "in the guise of judicial construction the Court should not re-write a statute".

In all the cases relied upon by plaintiff and AEL denying limitation, the action was by shipper against carrier, not carrier against carrier. Here Maislin, the second carrier, received a sealed container. As already noted, the ocean bill of lading issued by AEL had the usual $500 lim-

itation and it would be unusual to provide for a different provision with the later truck carrier. The tariff provision involved here, unlike that in the limitation cases relied upon, involved an "assumed $500 limitation". As appears from Maislin Ex. F, under the course of conduct between AEL and Maislin there were forty-six bills of lading prepared by AEL on its forms and in all of these the minimum freight rate was paid.

While no direct authority can be found recognizing the limitation, in the absence of a declaration of value in writing on the bill of lading, it can be argued with considerable force that under the course of conduct between AEL and Maislin, especially considering that Maislin was acting as agent for the shipper, AEL is estopped from questioning the limitation. However, in view of my conclusion that apart from limitation Maislin can not be held responsible, this need not be determined.

C.

Claim for Indemnity by AEL Against Maislin

In my view there is no sound basis for an indemnity claim against Maislin. I have already found that AEL was primarily responsible for the change of the temperature. It was more than a "but for" or "concurrent" cause. Its negligent and inaccurate instructions were the primary cause of the damage, constituting gross negligence, and I find that Maislin did not act irresponsibly in changing the temperature.

During oral argument I suggested the possibility that if the Court were to hold some measure of liability on the part of Maislin, consideration might be given to some apportionment of responsibility between AEL and Maislin.

In insisting that Maislin should be held solely responsible and that there would be no basis for an apportionment of responsibility, AEL cites certain authorities, *Misurella* v. *Isthmian Lines,* 328 F.2d 40 (2d Cir. 1964) and *Albanese* v. *MV Nederi Amerik Stoom-Mats,* 346 F.2d 481 (2d Cir. 1975), in which the shipowner, held responsible to a longshoreman, was allowed indemnity against the stevedore even though there was evidence of the shipowner's negligence. The Court held that there was a breach of implied warranty by the stevedore in performing the services for which it was employed. The rationale of these cases is that "the shipowner's own conduct will preclude it from obtaining indemnity from the stevedore" only when "it prevents or seriously handicaps the stevedore in his efforts to perform his duties". These authorities, which of course did not involve a claim by one carrier against another, are far afield from the present situation.

It is my view that even if the Court were to determine that Maislin is responsible and also can not avail itself of the dollar limitation of liability, this might be an appropriate case for the apportionment of liability between AEL and Maislin. However, it is my strong determination that Maislin should not be held responsible and AEL alone should be held responsible.

IV.

Conclusions

Plaintiff's sole remedy is against AEL and it is entitled to recover the value of the shipment in Canadian dollars at the time of the decomposition on September 28, 1976. It was agreed at the time of oral argument that the value

in American dollars of $92,100 in Canadian currency at such time was $94,760 and plaintiff should have judgment for such amount against AEL with interest from September 28, 1976.

Plaintiff's claim against Maislin should be dismissed and also AEL's claim against Maislin for indemnity.

V.

Miscellaneous

There are being filed with this report the transcript of the trial, the exhibits, and the briefs submitted by the parties.

Copies of this report have been mailed to counsel.

Any objection to or comments upon this report should be filed directly with Judge MacMahon.

Dated: New York, New York
March 26, 1979

/s/ Martin D. Jacobs
Martin D. Jacobs
United States Magistrate

Decision of Hon. Lloyd F. MacMahon, United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4175 (LFM)

GORDON H. MOONEY, LIMITED,

Plaintiff,

—against—

TERFLOTH & KENNEDY, B.V. et al.,

Defendants.

MACMAHON, *District Judge.*

Farrell Lines Incorporated, successor by merger to defendant American Export Lines, Inc. ("Export"), moves pursuant to Rule 53, Fed.R.Civ.P., to modify the post-trial report of Magistrate Jacobs to grant Export full indemnity from defendants Maislin Transport of Delaware and Maislin Transport Limited ("Maislin"), or, in the alternative, to apportion liability between Export and Maislin as joint tortfeasors.

Plaintiff, Gordon H. Mooney, Limited, brought this cargo damage action against Export and Maislin,* who then asserted cross-claims against each other. We referred the action to Magistrate Jacobs, who filed a post-trial report holding Export solely liable. We note in considering Export's motion to modify that report that we must accept the findings below unless they are clearly erroneous. *NLRB*

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* The action was discontinued as to defendant Terfloth & Kennedy, B.V. by stipulation.

v. *J. P. Stevens & Co.*, 563 F.2d 8, 14 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

It was stipulated that plaintiff contracted with Export to carry a cargo of frozen Dover sole from Amsterdam, the Netherlands, to Toronto, Canada; that plaintiff's shipper packed the fish into a container at minus 05° Fahrenheit; and that Maislin undertook to take the cargo from the ship at New York and transport it overland to Toronto. Furthermore, it is not disputed that the temperature inside the container was subfreezing upon its arrival in New York; that Maislin turned up the temperature setting to 40° Fahrenheit after taking custody of the cargo from Export; and that the cargo was in decomposed condition when opened in Toronto, resulting in a loss to plaintiff of $92,100 in Canadian dollars.

The undisputed facts leave no doubt that plaintiff made out its prima facie case against Maislin under the Interstate Commerce Act, 49 U.S.C. § 20(11) (1951), see *Missouri Pac. R.R.* v. *Elmore & Stahl*, 377 U.S. 134, 138 (1964), and against Export under the Carriage of Goods by Sea Act, 46 U.S.C. § 1303 (1975), see *Demsey & Associates, Inc.* v. *S.S. Sea Star*, 461 F.2d 1009, 1014 (2d Cir. 1972). The principle question below was whether either could rebut plaintiff's prima facie case by showing an absence of negligence or that the loss resulted from excepted causes.

On that question, Magistrate Jacobs found as follows:

When Export first took custody of the cargo in Amsterdam, it delivered to plaintiff a bill of lading which indicated that the cargo had been stored at minus 05° Fahrenheit. Upon turning the cargo over to Maislin in New York, Export prepared an "inland bill of lading" for Maislin which was silent as to any temperature requirement. Upon turn-

ing over the cargo, Export also prepared a "Trailer Interchange Receipt," which stated, "required temperature 50°, temperature set at 50°, temperature reads 50°." Maislin then prepared a "way bill," which stated, "Maintain 40 deg. temp."

Based on these findings, Magistrate Jacobs concluded that Export had been negligent in that it had prepared an inland bill of lading with no instructions regarding temperature settings and in that its Trailer Interchange Receipt specified a temperature of 50°. He also concluded that, in light of these documents, Maislin had not been negligent in raising the temperature setting to 40°. Our review of the testimony at the three-day trial and the supporting exhibits convinces us that neither the initial findings of fact nor the inferences drawn therefrom were clearly erroneous.

Our holding renders Export's contentions before us untenable. First, Export contends that Magistrate Jacobs erred in holding Maislin not liable, since the shipper had made out its prima facie case under the Interstate Commerce Act, 49 U.S.C. § 20(11), and Maislin had presented no evidence of its freedom from negligence. However, Magistrate Jacobs' finding that Maislin acted without negligence rebuts plaintiff's prima facie case. Second, Export contends that Maislin should have been held liable under the last carrier doctrine. However, that doctrine does not apply if the last carrier can show, as Maislin has, that it acted without negligence. *Madow Co.* v. *S.S. Liberty Exporter,* 569 F.2d 1183, 1185 (2d Cir. 1978). Likewise, the findings below leave Export with no grounds for contending that Maislin breached its warranty of workmanlike service or that it failed in its duties as bailee.

Decision of Hon. Lloyd F. MacMahon, United States District Judge

Export also contends that paragraph 10 of its bill of lading exempts it from liability from damage occurring after the cargo left its exclusive possession. We believe that Magistrate Jacobs correctly rejected that contention on the ground that paragraph 10 also imposes on Export the responsibility of an agent of the shipper after the cargo has left its custody. Clearly, paragraph 10 offers Export no protection if the damage resulted from Export's breach of its duty as the shipper's agent. We uphold the finding below that Export's erroneous instructions to Maislin constituted such a breach.

In sum, we adopt Magistrate Jacobs' conclusion that Export is solely liable for plaintiff's loss of $92,100 in Canadian dollars. Plaintiff is also entitled to interest on that amount, at the rate of 6% from the date the cargo arrived in Toronto. *Iligan Int'l Corp.* v. *S.S. John Weyerhaeuser,* 372 F. Supp. 859, 869 (S.D.N.Y.), *aff'd,* 507 F.2d 68 (2d Cir. 1974), *cert. denied,* 421 U.S. 965 (1975). However, we reject plaintiff's prayer for attorneys' fees.

Since there was no evidence that Export's shipper, defendant Seabridge International Shipping Ltd., was responsible for the loss, we dismiss the action as to it.

Accordingly, we deny defendant American Export Lines, Inc.'s motion, pursuant to Rule 53, Fed.R.Civ.P., to modify the report of Magistrate Jacobs.

Settle judgment within twenty (20) days.

Dated: New York, N.Y.

June 12, 1979

/s/ LLOYD F. MACMAHON
LLOYD F. MACMAHON
United States District Judge

Memorandum of Judge MacMahon, Amending the Decision

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4175 (LFM)

GORDON H. MOONEY, LIMITED,

Plaintiff,

—against—

TERFLOTH & KENNEDY B.V. *et al.*,

Defendants.

MACMAHON, *District Judge.*

We make two amendments to our memorandum decision, filed on June 13, 1979, denying Farrell Lines Incorporated's motion to modify the report of Magistrate Jacobs in this action.

First, the next to last paragraph on page 6 should begin, "Accordingly, we deny Farrell Lines Incorporated's motion. . . ."

Second, the number "78 Civ. 0913" should appear on the first page immediately under the number "77 Civ. 4175." Case 78 Civ. 0913 is identical in all respects to 77 Civ. 4175, and was consolidated with the latter case. Its number was inadvertently omitted from Magistrate Jacobs's report, and hence from our memorandum decision.

So ordered.

Dated: New York, N.Y.
July 3, 1979

/s/ LLOYD F. MACMAHON
LLOYD F. MACMAHON
United States District Judge

Opinion of United States Court of Appeals for the Second Circuit, Reversing the Judgment of the District Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 415—September Term, 1979

(Argued December 13, 1979

Decided February 22, 1980.)

Docket No. 79-7536

GORDON H. MOONEY, LTD.,

Plaintiff-Appellee,

—v.—

FARRELL LINES, INC., as successor by merger to American Export Lines,

Defendant-Appellant,

and

MAISLIN TRANSPORT OF DELAWARE and MAISLIN TRANSPORT LTD.,

Defendants-Appellees.

Before:

MULLIGAN, OAKES, and GURFEIN,*

Circuit Judges.

* Judge Gurfein participated in the oral argument in this case and voted before his death on December 16, 1979 to dispose of the case in the manner set forth in this opinion. He was unable to concur in the opinion itself since it was drafted after his death.

Opinion of United States Court of Appeals for the Second Circuit, Reversing the Judgment of the District Court

Appeal from a judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, holding appellant Farrell Lines, Inc., solely liable for the spoilage of a shipment of Dover sole from the Netherlands to Canada. Because the facts demonstrate that a second defendant, appellee Maislin Transport, was also negligent, we hold that appellant and Maislin are jointly liable for the loss.

Reversed and remanded.

JOHN J. PALMERI, New York, New York, *for Appellee Mooney.*

CHESTER D. HOOPER, New York, N.Y. (Haight, Gardner, Poor & Havens, New York, N.Y., Keith L. Flicker, M. E. DeOrchis, of counsel), *for Appellant Farrell Lines, Inc.*

HARVEY P. ROSENBERG, New York, N.Y. (Friedlander, Gaines, Cohen, Rosenthal & Rosenberg, New York, N.Y.), *for Appellees Maislin Transport of Delaware and Maislin Transport Ltd.*

OAKES, *Circuit Judge*:

This appeal, by the ocean carrier of a refrigerated ("reefer") container of frozen Dover sole, is from a judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, Judge. The judgment held the ocean carrier solely liable to the Canadian buyer-consignee for the value of

the fish, which arrived in a decomposed state, even though it was the inland carrier that changed the reefer temperature setting from −5° or −10° Fahrenheit to 40° Fahrenheit. Following reference to and a report by Magistrate Jacobs, the district court held that the ocean carrier, American Export Lines, Inc. (Export), was solely negligent; that Export's negligence in presenting the inland carrier, Maislin Transport of Delaware and Maislin Transport Ltd. (collectively Maislin), with an inland bill of lading ("inland bill") that contained no temperature directions and an "equipment interchange receipt" or "Trailer Interchange Receipt" (TIR) that referred to a 50° "required" temperature setting, rendered Maislin not negligent; and that it was therefore unnecessary to determine Export's claim of a right to indemnity or contribution or Maislin's claim of a $50 limitation of liability. Judgment was awarded to the plaintiff shipper solely against Export's successor by merger, Farrell Lines, Inc., for 92,100 Canadian dollars plus interest. We reverse.

FACTS

A brief review of the evidence and the documents is necessary. After receipt from Gordon H. Mooney, Ltd., the plaintiff below, of a purchase order for 1400 cartons of Dover sole, the Netherlands supplier packed the cartons into a pre-cooled refrigerated reefer without incident. When received at the Amsterdam dock, however, the refrigerated unit developed a malfunction and the 1400 cartons had to be transferred to another reefer by the carrier, Export. A second malfunction developed and another transfer was made, but there is no dispute in the case that following the second trans-

fer the 1400 cartons were still in their original, frozen condition, and the trip from Holland to New York was without incident. When the container was delivered to Maislin for transportation from New York to Toronto on September 8, 1976, Export prepared an inland bill of lading which, while it referred to "Dover Sole," contained no instructions concerning temperature. In addition, Export's "Equipment Condition Inspection Report" said nothing in section 7 relating to "reefers," where there are three lines as to "req. temp. ____," "temp. set at ____," and "temp. reads ____." According to the testimony of the truck driver for Maislin, Mr. Terrell, he received these two documents and he also observed an Export reefer mechanic[1] get up on the container and read the temperature setting and then fill out a handwritten slip of paper or "chit," which he gave to Terrell. The reefer mechanic's chit, after noting the date and number of the trailer, says "req. temp. 50°, temp. set at 50°, temp. reads 50°." Terrell then gave the chit to another Export employee who completed the equipment interchange receipt (TIR). There was no separate temperature reading when the TIR was filled out; rather, reference was made solely to the "chit." There is no dispute, however, that the temperature both was set at, and read, between −5° and −10° at the time of delivery to Maislin, though Maislin could not produce the "Partlow" thermograph chart that was on the reefer at the time of delivery.[2]

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1 There was testimony that the reefer mechanic was an employee not of Export itself but of an independent maintenance contractor engaged by Export. Export, however, does not deny its responsibility for his acts on this account.

2 This assumes, of course, that such a chart—on a disc—was inserted. Export did have its chart up to the date of delivery. There was testimony that in the ordinary course of business, a new one

How or why the Export reefer mechanic made the error on the handwritten "chit" is only one of the several mysteries in the record. It is possible that the mechanic misread the thermograph, although that seems unlikely. The Maislin driver remembered the mechanic's climbing up to look at the chart. According to the surveyor who subsequently checked the matter out, there was some talk in the Export yard that there were several other containers containing photographic equipment or film in the yard on September 8 and that some of these carried with them a 50° required temperature. The mechanic may have assumed that the Dover sole reefer was one of those, but this explanation would mean that he did not look at the Partlow chart and conflicts with the Maislin driver's memory of the event. Or, conceivably, the mechanic may have acted intentionally, for reasons that can only be surmised.[3] The mystery is unsolved.

The fact remains, however, that it was the Maislin people who changed the temperature setting on the containers in question to 40°, probably after the reefer

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would have been inserted by the reefer mechanic. It is interesting that on October 8, 1976, after the damage to the fish was discovered, the surveyor removed a Partlow chart from the reefer which was a 7-day rather than the 31-day recording type although the thermograph operates on a 31-day cycle. The 7-day chart had no notations as to temperature, date installed, container number, or the like. Thus, if a Partlow chart had been installed at the time of delivery to Maislin it had also been removed by Maislin.

It is also interesting that Maislin's own records—kept on "Thermo-King" charts and representing drivers' notations of the reefer temperatures supposedly taken every two hours—are missing for the period Sept. 10-20 and intermittently thereafter.

3 Crawford, the surveyor, testified that various maintenance people at the pier informed him of what he called this "photographic material scenario," but when he asked if the people involved would talk to the Export lawyer he "was informed that if [he] mentioned anything of this nature again, that they would take physical action against [him]."

arrived at Fort Erie, Ontario. The Maislin witnesses testified that when their clerical office sought to fill out their "pro" or "way" bill at the terminal in South Kearny, New Jersey, Mrs. Crapser, the clerk with the responsibility for preparing the bill, decided that the container needed some "protective service," not, she said, because she knew what Dover sole was, but because she saw the word "reefer" and wondered if it was fish. She made inquiry of the Maislin line haul dispatcher, Mr. Gallo, and brought to his attention the fact that the container was a reefer and that it should have "protective service." According to his testimony, although he had the TIR showing a 50° required setting, he called the maintenance man, Lefty Fahrenfeld. Lefty left the terminal to check the setting, presumably made a physical check, and came back in a matter of minutes and said that it was running at 40°. All this supposedly occurred on September 8, the day the shipment arrived at Maislin's yard in South Kearny, New Jersey. The 40° figure was inserted by Mrs. Crapser on the pro or way bill as the temperature to be maintained, and it was subsequently carried on the Maislin record of "Thermo-King" temperature checks as the required setting. There is also in evidence a memo dated September 9 on a Crystal Glass Company memo pad, evidently written at Fort Erie, Ontario by a Maislin employee, reading:

. . . .

Came from Buffalo at 10°F,
Temp. does not go up.
Should be a 40°F.
Shut off.
leave it shut off
Bill

And the Maislin Thermo-King temperature-check records contain two notations for September 9, when the truck left Buffalo for Canada: "reset for [illegible]" and "just arrived, shut off."

The Thermo-King readings between September 11 and September 20, by which time the container was sitting in Maislin's Toronto terminal, were lost or not available, *see* note 3 *supra*, but by September 20, the temperature reading had crept up to 35°. Thereafter, it stayed at 40° until about September 24. The Maislin records show no temperature readings after the 25th until 8:00 a.m. on the morning of the 27th, at which time the reading was 0°, even though the same Maislin record sheet called for a setting of 40°.[4] The temperature check record of September 29 shows the setting at 0° and the temperature reading at 20°. That was the day Maislin sought to make delivery to the consignee, but it was refused.[5] The following day, delivery was again attempted, but it was again refused and the goods were returned to the Maislin terminal for survey and potential salvage. The fish was subsequently found to be largely decomposed and spoiled, although some of

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4 There was evidence that a Maislin employee in New York, apparently advised that the temperature setting was wrong, told the Toronto office on September 28: "Show 5 degrees. This is fish and where blood is coming from I don't know. Suggest you get this down before effecting delivery . . . ."

5 A skeptic might surmise that at the last minute, carrying out the instructions from New York, *see* note 5 *supra*, the Maislin people turned down the temperature of the reefer to stem the flow of fish blood and make the fish appear properly frozen before delivery to the consignee. This would tend to support the veracity of a record made by Mr. Darlington, an Export customs agent, of a telephone conversation he had with a Maislin employee in New York on October 8. He was informed in that call that the Maislin employee in the New York office who had sent these instructions "was aware that the container was set at wrong temp. and it was Maislin's mistake."

it was apparently salvaged at a very low price immaterial to the consideration of our case. There was expert testimony from a transportation consultant, Cecil W. Henkels, to the effect that a TIR generally goes to a trucking line's operating department, as opposed to the rate clerk, but that an upward temperature change would not be made without authorization from either the original shipper or the carrier from which the shipment was obtained.

DISCUSSION

The magistrate's and district court's findings that Export was negligent, and therefore liable,[6] were clearly supported by the evidence. Even though Export submitted evidence of numerous other reefer inland bills it had prepared which went to Maislin and con-

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6 The question of what law governs Export's conduct is a somewhat difficult one. The district court thought that the applicable provision was in the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1303(2) ("The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."). But COGSA further states that "[t]he term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. § 1301(e). Thus an issue arises here because Export's negligence took place on land, after discharge from the ship. If COGSA does not apply here, then the applicable provision is the earlier Harter Act, 46 U.S.C. §§ 190-196, which has the effect of preserving the common law duty of a carrier to exercise due care in *all* handling of cargo, even when there are contrary contractual provisions. The question of which act applies ultimately matters little, however, because, "except for unimportant differences in phraseology, the two Acts come down to much the same thing, as to liabilities which might be incurred before loading or after unloading." G. Gilmore & C. Black, *The Law of Admiralty* § 3-25, at 148 (2d ed. 1975). For the same reason, we find it unnecessary to discuss the validity of a provision in Export's bill of lading stating that COGSA governs "before the shipment is loaded on or after it is discharged." *See id.* (no provision in COGSA explicitly authorizes "contracting out of Harter and in COGSA" for period after unloading and before delivery).

tained no temperature directions, there was testimony by the marine surveyor that it was "certainly an error" not to have included such directions on the inland bill. Export's consultant, Mr. Henkels, confirmed that ordinarily all shipping instructions are contained on the shipping order. Moreover, there was the handwritten chit erroneously prepared by the Export reefer mechanic—for whatever reason—which did contain a 50° reading as well as a 50° setting. The same figures appear on the TIR, a more formal document prepared and signed by Export, though also signed by Terrell, the Maislin trucker. These errors at least contributed to the unfortunate chain of events and render Export liable. Export's own manager of maintenance and repair testified that he felt "there was an error made on both parts," the reefer mechanic's and the truck driver's.

But Maislin too was at fault, in a variety of ways. Its driver, Terrell, signed the TIR, noting that the equipment was "received in good condition except as noted." The temperature setting at that time was, indisputably, −5° and the temperature reading was at or about −10°.[7] Yet the TIR, based on the mechanic's chit, showed the reading as well as the setting at 50°, indicating that Terrell did not double-check the reefer mechanic. Moreover, even though Mrs. Crapser in the Maislin terminal at South Kearny may not have been alert as to what "Dover Sole" is, she was at least aware enough to suspect that "fish" was involved and that,

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7 The district court found:

> [I]t is not disputed that the temperature inside the container was subfreezing upon its arrival in New York; that Maislin turned up the temperature setting to 40° Fahrenheit after taking custody of the cargo from Export; and that the cargo was in decomposed condition when opened in Toronto. . . .

the container being a reefer, some "protective service" was required. When Gallo accordingly sent "Lefty" out to check the trailer at a time when, according to all the expert testimony, the cargo was still at a very low temperature and probably had not thawed at all (it obviously would not have thawed at all if the temperature setting had not yet been changed), Lefty came back to report that the reefer was running at 40°. This was the figure adopted for use in the inland bill Mrs. Crapser prepared, an erroneous figure under any factual construction. An inquiry as to what "Dover Sole" is at this point, or a check with either Export, the original shipper, or even the consignee, would have revealed that the fish was or might be frozen, not smoked, and hence would require a 0° setting or lower. Instead, Lefty's 40° figure—the source of which remains undetermined[8]—was adopted without further check.

Despite the figure inserted on the TIR or the setting on the Maislin Thermo-King charts, the reefer apparently continued to retain its −10° temperature. At least this is what the Thermo-King charts show, though a Maislin witness, its claims director, surmised that this was an error by the truck driver(s) and that he (they) had read the compression indicator rather than the temperature chart. In any event, on arrival September 9 at Fort Erie, Ontario, in the Maislin holding area, the reefer was "shut off" in according with "Bill's" directions on the Crystal Glass memo paper, in

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8 The Maislin claims man, Pace, said that Gallo, the dispatcher, "concluded in his own observations that it would be safe to hold it somewhat cooler than [the 50° required by the TIR], and he chose a temperature of 40 degrees." Gallo testified that, after talking to Lefty, he told Mrs. Crapser that "[t]he reefer is running at 40 degrees and I will set it at 40 degrees."

order to get it up to the 40° temperature called for, since "Temp. does not go up." The fact that it had to be "shut off"—the record does not disclose for how long because the Maislin records are missing—to get it *up* to a temperature of 40° is an indication that it was probably still set at a much lower temperature, or at least running at one. This shutting off would not have occurred had Maislin itself used proper procedures. True, as the magistrate suggested, it was partly due to the error in the TIR and hence to some extent "attributable to" Export. But it was negligent to change the temperature setting of the reefer without further inquiry. It was also negligent to prepare the way bill with a 40° setting requirement, without further inquiry or investigation, once it was learned that the cargo was fish being transported in a refrigerated contained.

Even assuming that there was total reliance by the trucker on the TIR for temperature requirements here (which seems dubious because the 40° appearing on Maislin's way bill differs from the 50° figure on the TIR), we think that such reliance was unjustified. When a trailer is transferred from one carrier to another, employees of each do, or should, inspect it, and the receiving trucker's signature on the TIR is as much of a certification by him as to its condition as is the signture of the transferring carrier's employee. *Cf. Anello v. Murphy Motor Freight Lines, Inc.*, 525 F.2d 276, 278 n.2 (2d Cir. 1975) (as to condition of trailer itself). Moreover, the *actual* setting of the container temperature control is, if it differs substantially from the TIR figures, notice to the receiving carrier—notice that at least should provoke further inquiry.

A finding of negligence or lack of it, unlike a finding of the underlying facts, is subject to review not based

on the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). *Master Shipping Agency, Inc. v. M.S. Farida*, 571 F.2d 131, 133 (2d Cir. 1978); *Director General of India Supply Mission v. S.S. Maru*, 459 F.2d 1370, 1373 n.3 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973). On these facts, we have little difficulty in concluding that Maislin was negligent.

As a result, Maislin must be held liable along with Export. Under the Carmack Amendment,[9] which governs interstate motor carriers, a prima facie case for liability is made by proof of shipment in good condition, arrival in damaged condition, and the amount of damages. *Missouri Pacific Railroad v. Elmore & Stahl*, 377 U.S. 134, 138 (1964). "Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence *and* that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability." *Id.* (emphasis added).[10]

Because of its negligence, Maislin failed to rebut the prima facie case against it. *See Continental Can Company v. Eazor Express, Inc.*, 354 F.2d 222 (2d Cir. 1965). It is true that certain actions of the shipper itself are one of the "excepted" causes that, if shown,

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9 49 U.S.C. § 20(11), (12) (1976), *revised without substantive change and reenacted as* 49 U.S.C.A. § 11707 (West Supp. 1979).

10 Under the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1304(2), liability falls upon the last ocean carrier, unless it can prove that it was not negligent, *or* that the loss was within one of the COGSA "excepted causes," *Madow Co. v. S.S. Liberty Exporter*, 569 F.2d 1183, 1185 (2d Cir. 1978). However, under the Carmack Amendment, 49 U.S.C. § 20(11) (1976), *reenacted without substantive change as* 49 U.S.C.A. § 11707 (West Supp. 1979), the burden on an *inland* carrier is clearly to show *both* that it was free from negligence *and* that the damage to the cargo resulted from one of the excepted causes. *Martin Imports v. Courier-Newsom Express, Inc.*, 580 F.2d 240, 242 (7th Cir.), *cert. denied*, 439 U.S. 983 (1978). This rule was misstated by the court below.

can protect a carrier from liability for damage to goods. And the "shipper" for these purposes (Export, which delivered the goods to Maislin) certainly contributed to the events through its negligence. But a showing that Export as "shipper" is liable does not relieve Maislin as carrier of liability for the damage, if that damage would not have occurred except for Maislin's concurrent fault. *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 405 (2d Cir.), *cert. denied*, 275 U.S. 571 (1927). That is to say, the excepted cause (here negligence of the ocean carrier *qua* "shipper") must be the sole cause. *Id.*; *cf. Levatino Co. v. American President Lines*, 337 F.2d 729, 730 (2d Cir. 1964) (admiralty case under Harter Act) ("act of God" was not sole cause of loss).

At the same time, because Export's negligence contributed to the loss, Export cannot obtain indemnity from Maislin. *Cf. Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567 (1958) (shipowner "entitled to indemnity absent conduct on its part sufficient to preclude recovery"). With respect to the issue of possible contribution between these two tortfeasors, we note that maritime law, applicable to the conduct of Export, does permit contribution. *Cooper Stevedoring Co. v. Kopke, Inc.*, 417 U.S. 106 (1974). On the other hand, the liability of Maislin is predicated on the Carmack Amendment, and that legislation, as well as case law under it, is silent on the issue of contribution. *See* 49 U.S.C. § 20(11), (12) (1976), *revised without substantive change and reenacted as* 49 U.S.C.A. § 11707 (West Supp. 1979). Nevertheless, because that amendment was merely an enactment of already existing common law rights, to which certain specific remedial rights were added, *J &*

H Flyer Inc. v. Pennsylvania Railroad Co., 316 F.2d 203 (2d Cir. 1963), we feel justified in turning to common law principles to fill in the gap in the statute concerning contribution. Because there is a clear trend in the law toward a rule allowing contribution among joint tortfeasors, we hold that contribution is available here—in this situation of joint liability shared by a maritime shipper and an inland trucker.

To the extent that Maislin may be said to have breached a warranty of workmanlike service, *see Fairmont Shipping Corp. v. Chevron International Oil Co.*, 511 F.2d 1252 (2d Cir.), *cert. denied*, 423 U.S. 838 (1975), Export's own acts contributed to the breach, so that the parties are joint tortfeasors, *see Hurdich v. Eastmount Shipping Corp.*, 503 F.2d 397 (2d Cir. 1974), as noted above.

Maislin argues, in a brief which otherwise simply relied on the magistrate's and district judge's findings, that Export, acting as agent for a shipper, voluntarily chose a lower release value rate carrying a $500 limitation of liability under the applicable tariff. The magistrate also thought that, due to the course of dealing between the two, Maislin's liability might be so limited, even though the Carmack Amendment requires that any such limitation of liability be "declared in writing by the shipper or agreed upon in writing as the released value of the property." 49 U.S.C. § 20(11) (1976).[11] The course of dealing referred to by the mag-

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11 The 1978 revision of this portion of the Carmack Amendment, intended to make no substantive change, is in 49 U.S.C.A. § 10730 (West Supp. 1979) (carrier may establish rates "under which the liability of the carrier . . . is limited to a value established *by written declaration of the shipper, or by a written agreement*, when that value would be reasonable under the circumstances surrounding the transportation") (emphasis added).

istrate consisted of some 46 bills of lading prepared by Export on its forms and paying the minimum rate. But because neither the freight rate nor the valuation itself was written on the bill of lading, Maislin may not limit its liability under the statute. *Mass v. Braswell Motor Freight Lines*, 577 F.2d 665, 667 (9th Cir. 1978); *Thomas Electronics, Inc. v. H.W. Taynton Co.*, 277 F. Supp. 639 (M.D. Pa. 1967); *Loeb v. Friedman's Express, Inc.*, 187 Misc. 89, 65 N.Y.S.2d 450 (Sup. Ct. App. Term), *aff'd mem.*, 271 A.D. 873, 66 N.Y.S.2d 634 (1946), *aff'd per curiam*, 296 N.Y. 1029, 73 N.E.2d 906, *cert. denied*, 331 U.S. 851 (1947).

Judgment reversed; cause remanded; costs of appellant to be equally divided between appellant and appellee Maislin.

Order of United States Court of Appeals Clarifying Its Opinion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

79-7536

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of March 21, one thousand nine hundred and eighty.

Present:

Hon. William Hughes Mulligan,
Hon. James L. Oakes,

Circuit Judges.

GORDON H. MOONEY, LTD.,

Plaintiff-Appellee,

v.

FARRELL LINES, INC.,
as successor by merger to American Export Lines,

Defendant-Appellant,

and

MAISLIN TRANSPORT OF DELAWARE and
MAISLIN TRANSPORT LTD.,

Defendants-Appellees.

ORDER

In response to the request for clarification of our opinion filed on February 22, 1980, in holding that appellant Farrell

Order of United States Court of Appeals
Clarifying Its Opinion

Lines, Inc., and appellee Maislin were jointly liable for the loss, it was the intention of the court that each party should be liable for 50% of the damages.

/s/ WILLIAM H. MULLIGAN

/s/ JAMES L. OAKES

Circuit Judges.

Order of United States Court of Appeals Extending Time to File Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

79-7536

GORDON H. MOONEY, LIMITED,

Plaintiff-Appellee,

—against—

TERFLOTH & KENNEDY B.V., *et al.*,

Defendants,

FARRELL LINES, INCORPORATED, *et al.*,

Defendant-Appellant,

and

MAISLIN TRANSPORT OF DELAWARE, *et al.*,

Defendants-Appellees.

NOTICE OF MOTION FOR ORDER ENLARGING TIME TO FILE PETITION FOR REHEARING

MOTION BY: (Name and tel. no. of attorney in charge)

SIDNEY GAINES, ESQ.
(212) 575-9100

Has opposing counsel consented?	☒ Yes	☐ No
Has service been effected?	☒ Yes	☐ No
Is oral argument desired? N/A (Substantive motions only)	☐ Yes	☐ No

Order of United States Court of Appeals Extending Time to File Petition for Rehearing

Requested return date: N/A
(See Second Circuit Rule 27(b))

Date of argument of appeal, if scheduled: N/A

Judge or agency whose order is being appealed:
Decision of Hon. Lloyd M. MacMahon, U.S.D.J.,
U.S. Dist. Court (S.D.N.Y.) filed June 13, 1979

OPPOSING COUNSEL:
(Name and tel. no. of attorney in charge)

JOHN PALMERI, ESQ.—(212) 269-1010

CHESTER D. HOOPER, ESQ.—(212) 344-6800

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below?
(See F.R.A.P. Rule 8.) ☐ Yes ☐ No

Would expedited appeal eliminate need for this motion?
☐ Yes ☐ No

If no, explain why not:

Brief statement of the relief requested: Defendants-Appellees request a reasonable enlargement of time within which to file a Petition for Rehearing pursuant to Rule 40, F.R.A.P.

Previous requests for similar relief and disposition: NONE

Statement of the issue(s) presented by this motion: Whether Defendants-Appellees are entitled to a reasonable enlargement of time within which to file a Petition for Rehearing of the decision of this Court, dated and filed Feb-

Order of United States Court of Appeals Extending Time to File Petition for Rehearing

ruary 22, 1980, in light of circumstances set forth in the accompanying affidavit of Martin J. Hertz, Esq.

Brief statement of the facts *(with page references to the moving papers):* The presence of substantial questions of law (pp. 2, 3; Aff't. of Martin J. Hertz) and a voluminous record (p. 5; Aff't.) make it impossible to prepare Appellees' Petition for Rehearing within the time prescribed by Rule 40 F.R.A.P.

Summary of the argument *(with page references to the moving papers):* See Statement of Facts, above.

March 6, 1980

/s/ Sidney Gaines
Sidney Gaines
Attorney for Defendants-Appellees

Order

It Is Hereby Ordered that the motion to extend the time to file a petition for rehearing to and including April 10, 1980 be and it hereby is Granted.

/s/ James L. Oakes
Hon. James L. Oakes, CJ
Circuit Judge

March 18, 1980

Order of United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

79-7536

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of May, one thousand nine hundred and eighty.
Present:

HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES
Circuit Judges.

GORDON H. MOONEY, LIMITED,
Plaintiff-Appellee

TERFLOTH & KENNEDY B.V., AMERICAN EXPORT LINES, INC., *et. al.*,
Defendants

FARRELL LINES INC. as Successor by merger to American Export Lines, Inc.,
Defendant-Appellant

MAISLIN TRANSPORT OF DELAWARE and MAISLIN TRANSPORT LIMITED,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the Defendants-Appellees

Order of United States Court of Appeals
Denying Petition for Rehearing

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/ A. Daniel Fusaro
A. Daniel Fusaro, Clerk

Due to his untimely death on December 16, 1979, Judge Gurfein, a member of the panel, did not participate in the consideration of this petition.

Text of Carmack Amendment, 49 U.S.C., Section 20(11), Applicable During the Times in Question

§ 20, par. (11). *Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.* Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such

Text of Carmack Amendment, 49 U.S.C., Section 20(11), Applicable During the Times in Question

receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided,* That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and

Text of Carmack Amendment, 49 U.S.C., Section 20(11), Applicable During the Times in Question

maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulations, or otherwise a shorter period for the filing of claims than nine months, and for the institution of

Text of Carmack Amendment, 49 U.S.C., Section 20(11), Applicable During the Times in Question

suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided. Feb. 4, 1887, c. 104, Pt. I, § 20, 24 Stat. 386; June 29, 1906, c.. 3591, § 7, 34 Stat. 593; Mar. 4, 1915, c. 176, § 1, 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; Feb. 28, 1920, c. 91, §§ 436-438, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; Mar. 4, 1927, c. 510, § 3, 44 Stat. 1448; Apr. 23, 1930, c. 208, 46 Stat. 251; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 13(b), 54 Stat. 919. (Underlining supplied.)

Text of 49 U.S.C., Section 10730, Effective October 17, 1978

§ 10730. *Rates and liability based on value*

The Interstate Commerce Commission may require or authorize a carrier providing transportation or service subject to its jurisdiction under subchapter I, II, or IV of chapter 105 of this title, to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation. A rate may be made applicable under this section to livestock only if the livestock is valuable chiefly for breeding, racing, show purposes, or other special uses. A tariff filed with the Commission under subchapter IV of this chapter shall refer specifically to the action of the Commission under this section.
Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1389.

Mailin Exhibit F.

A555

Memorandum in an acknowledgment that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record. RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

Maislin E

From [redacted] (Name of Carrier) AMERICAN EXPORT LINES Carrier's No.

At [redacted] New York, N. Y. 10006 17 BATTERY PLACE, NYC. Purchase Order No.

9/3 19 76 Shipper's No. 447

The property described below, in apparent good order except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official Classification No. 1 in effect on the date hereof, if this is a rail or rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment. Agents of the carrier are not authorized to waive or modify any of the terms or conditions of the said Uniform Domestic Straight Bill of Lading, which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to SEABRIDGE INTERNATIONAL SHIPPING LTD 7347 KIMREL ST.,MISSISSAUGA,ONT.CANADA

(MAIL OR STREET ADDRESS OF CONSIGNEE — FOR PURPOSES OF NOTIFICATION ONLY.)

Destination H.GORDON MOONEY State TORONTO County CANADA

Route TO: MIDCONTINENT TRUCK TERMINAL NOTIFY: RUTHERFORD CUSTOM BROKERS Delivery Address★

(★To be filled in only when shipper desires and governing tariffs provide for delivery thereat.)

Delivering Carrier MAIBLIN TRANSPORT Car or Vehicle Initials No.

No. Packages	Kind of Package, Description of Articles, Special Marks and Exceptions	*Weight (Subject to Corr.)	Class or Rate	Check Column
CMLU 880225	ONE (1) 40' REEFER CNTR.; STC: 1400 CTNS. DOVER SOLE.	35,701#		
	"CONTAINER MUST NOT BE RELEASED WITHOUT AUTHORIZATION			

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Inland Bill of Lading For the Shipment in Question

48a

FROM SEABRIDGE INT'L SHIPPING LTD."

EXP. FREEDOM V-45 B/L No. 400666 AMSTERDAM-ARRVD. 9/3

T & E No. 12789073

[redacted]

[redacted]

RECEIVED
SEP 8 19

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

C. O. D. SHIPMENT

C. O. D. Amt. _____

Collection Fee _____

Total Charges _____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is carrier's or shipper's weight.
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per

MAISLIN TRANSPORT

†The fibre boxes used for this shipment conform to the specifications set forth in the box maker's certificate thereon, and all other requirements of the Consolidated Freight Classification. †Shipper's imprint in lieu of stamp; not a part of bill of lading approved by the Interstate Commerce Commission.

[redacted]
AMERICAN EXPORT LINES
New York, N. Y.

Shipper

Agent

Per P. K. PORTOR

Permanent post-office address of shipper.

[By counsel: The language concerning limitation of liability appears where indicated by the arrow, which did not appear on the original.]